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SUPREME COURT, U.S.

(3)

No. 07-375

In The Supreme Court of the United States

AL RABIEE and WILLIAM H. WHITEHEAD,
Appellants,

v.

CALLIE T. DIETZ, in her official capacity as Director of the Alabama Administrative Office of the Courts,
Appellee.

On Appeal from the Decision of a Three Judge District Court for the Northern District of Alabama Appointed Pursuant to 42 U.S.C. § 1973c

RESPONSE IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM OR DISMISS

WILLIAM E. RUTLEDGE
Counsel of Record

ROGER C. APPELL
3800 Colonnade Parkway
Suite 490
Birmingham, AL 35243
Telephone: (205) 969-2868

Counsel for Appellants

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ARGUMENT

I.

INTRODUCTION

The Defendant-Appellee, Callie T. Dietz, in her official capacity as Director of the Alabama Administrative Office of the Courts ("AOC"), has replied to Appellants' Jurisdictional Statement ("AJS") by moving to affirm the district court decision ("Opinion") or to dismiss this appeal ("Motion") on the following grounds: (1) Appellants argue only that the district court was wrong in its decision without showing why the district court was wrong; (2) the appeal is frivolous; and (3) the appeal raises nothing new not presented to the district court. (Motion at 15).

The extent of AOC's misunderstanding of this appeal is shown by the AOC's statement of the question presented. AOC states the question as whether AOC may be compelled to submit a state statute for preclearance under 42 U.S.C. § 1973c or to enforce *Ala.Code*, 1975, § 12-24-2. (Motion at 1). Contrary to this statement of the question, what is actually presented is the issue of jurisdiction under Rule 18, Supreme Court Rules. The motion to dismiss filed by AOC discusses only its view of the merits of the appeal. It makes no jurisdictional argument. We must assume AOC does not challenge jurisdiction.

However, Rule 18(12), Supreme Court Rules, allows the Court to dismiss the appeal on the merits after reviewing the jurisdictional documents.

Plaintiffs, therefore, with regard to Rule 18(12) reply herein to AOC's attack on the merits of the appeal.

II.

STANDARDS FOR GRANTING AOC'S MOTION TO DISMISS

AOC does not state what standard of review it claims is applicable to this appeal. The standard of review to be applied to this appeal by this Court reviewing the panel decision ("Opinion") is *de novo* because it involves only questions of law. *Pierce v. Underwood*, 487 U.S. 552, 558, 108 S.Ct. 2541, 2546, 101 L.Ed.2d 490 (1988). The basic question of law is whether the Rule 12(b), *Fed.R.Civ.P.*, motion to dismiss should have been granted.

It is not stated in the motion to dismiss which, if any, of the Rule 12(b) grounds for dismissal is invoked as a basis for dismissal. (AJS Appendix F). The Opinion did not state what standard it applied in granting the motion to dismiss. (AJS Appendix A). Plaintiffs' analysis of the motion indicates that the motion is based on failure to state a claim. Rule 12(b)(6), *Fed.R.Civ.P.*

In its recent decision of *Bell Atlantic Corporation, et al. v. Twombly, et al.*, ___U.S.___, 127, S.Ct. 1955, 167 L.Ed.2d 929 (2007), this Court did away with the long standing rule of *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957),

that a motion to dismiss based on Rule 12(b)(6) should be denied unless it was clear beyond doubt that no facts could be proved that would support a claim for relief. In *Twombly*, the Court changed the rule to provide that in order to overcome a motion to dismiss the plaintiff must plead enough facts to make the claim plausible on its face. The Court stated that the plaintiff must "nudge" the claim across the line from "conceivable" to "plausible." AOC did not call the *Twombly* case to the panel's attention and the Opinion does not mention it.

The question that should have been decided by the Panel on June 8, 2007, two weeks after *Twombly* was decided, was whether the complaint survived the *Twombly* test by stating sufficient facts to make Plaintiffs' claims plausible. The word "plausible" is defined in *The American Heritage Dictionary*, Second College Edition, as "seemingly true, acceptable, seemingly honest, trustworthy." The question before this Court if it decides to consider the merits of this appeal under Rule 18(12) is to determine, based on *de novo* review, if the facts alleged establish that Plaintiffs' claims for relief are "plausible." One way to test whether allegations are plausible is to determine whether the opposing position is implausible. AOC's position on the merits of this appeal is implausible.

The AOC's position is that even though the complaint alleges that numerous Alabama judges have asked AOC for a decision as to whether they should obey the Statutes and even though AOC has replied to them that the Statutes must be precleared (under § 1973c) and that the AOC will not enforce them until

they are precleared, the AOC has no authority or duty to receive such inquiries or to make such responses. The complaint alleges that AOC did accept these inquiries and did make these responses. (AJS, Appendix E at 33-35). The Opinion does not even consider the import of these facts.

The Opinion in granting AOC's motion looked only to AOC's duty under the Statutes in question ("Statutes") and failed to consider AOC's powers and duties in the enforcement of all statutes and the overall supervision of the Alabama court system. (See, *e.g. Ala.Code*, 1975, §§ 12-5-3, 6, 9, 10 and 13).

III.

THE "STANDING" ISSUE

The allegations of the complaint state that the Plaintiffs are plaintiffs in cases pending in state court before judges who have received more than $2,000.00 from opposing parties and counsel so that if the Statutes were enforced they could automatically recuse those judges. Plaintiffs ask for a determination that the Statutes do not require preclearance under 42 U.S.C. § 1973c and for appropriate orders to the AOC to enforce the Statutes. Alternatively, Plaintiffs seek reference of the Statutes to the Department of Justice. (AJS, Appendix E).

The AOC according to the complaint has blocked enforcement of the Statutes by insisting to members of the Alabama judiciary that the Statutes must be precleared before they can or will be enforced. The

Opinion states that previously the Plaintiffs sued the Alabama Attorney General who is responsible for submitting the Statutes for preclearance, but because the Plaintiffs and the Attorney General agreed that the Statutes did not require preclearance, there was no case or controversy and that case was dismissed. The panel sitting on that case made that ruling even though the present Attorney General, and his predecessors in office, whose duty it is to both enforce Alabama law and to submit Alabama laws for preclearance under § 1973c, had never made any attempt to enforce the Statutes or submit them for preclearance.

The Opinion states that Plaintiffs have no standing to bring this action because: (1) AOC has no duty to enforce the Statutes; (2) Plaintiffs do not allege any injury caused by the non-enforcement of the disclosure requirements of subsection(a) of the Statutes; and (3) AOC cannot redress Plaintiffs' injuries. The Opinion holds that any injury to Plaintiffs alleged in this case "is the result of inaction of third parties not before this panel, the Supreme Court of Alabama, the Alabama Secretary of State, and/or the Attorney General of Alabama." (AJS, App. A at 16).

(a) **The Duty of the AOC Relative to the Statutes**

The complaint alleges that for a period of 18 months, January of 1999 to June of 2000, numerous Alabama circuit judges wrote the AOC and asked it whether they should comply with the Statutes. These

judges based their decision to obey or not obey the Statutes on what the AOC told them, not the officials listed in the Opinion as responsible for enforcing the Statutes. The judges followed the AOC opinion rather than the Alabama Attorney General's opinion. The Opinion does not discuss this allegation, much less analyze its significance.

It is plausible that Alabama judges have relied on AOC in deciding whether to obey the Statutes. They obviously believed AOC had the power to make the determination as to the enforceability of the Statutes. It is implausible that they relied for this purpose on an entity that, as the AOC now puts it, had "no authority, responsibility, obligation or duty" to enforce the Statutes. The Statutes provide that judges who do not comply with them lose their pay. No one would rely on a helpless entity at the risk of losing their pay, particularly in view of the Alabama Attorney General's contrary opinion.

The AOC replied to these judges that, "...our office must agree that until this legislation is precleared, it is not legally enforceable and our office will not take any action for non-compliance with the [Statutes]...". (AJS, Appendix E at a34). Is it plausible that given the source of these questions and answers and the plain language involved that AOC did not believe it had the power to enforce or not enforce the Statutes? AOC clearly claimed to have the "authority, responsibility, obligation or duty" to enforce the Statutes. AOC did not tell the judges who relied on it,

as it now represents to the federal court, that it had no power or duty to decide whether the Statutes should be enforced. It did not tell the inquiring judges that they should write the state officials named in the Opinion as the only officials with the power to enforce the Statutes. Instead, AOC defied the Alabama Attorney General's opinion with its own contrary opinion delivered to Alabama judges.

(b) The Power of the AOC Under Alabama Law

In order to give some idea of the power of AOC, consider that it has with impunity defied the opinion of the Alabama Attorney General and the Alabama Governor by taking the position contrary to those officials that the Statutes require preclearance. Moreover, this contrary opinion has been communicated by AOC to Alabama judges to direct their disregard of these duly enacted Statutes. Those judges have followed AOC rather than the Attorney General. Finally, the Attorney General and the Governor of Alabama have refused to attempt to enforce the Statutes in the face of AOC's defiance. All of this is clear from the facts pled in the complaint and makes it clear that Plaintiffs' claims are plausible.

The Opinion came to its erroneous ruling granting the motion to dismiss by considering only the role of the AOC stated in the Statutes instead of viewing AOC's power to enforce all statutes applicable to the Alabama court system. These AOC statutes are set out in AJS pages 7-12. In particular, the Court is referred to *Ala.Code*, 1975, § 12-5-6 (AOC responsible

for trial court administration); § 12-5-9 (AOC to assist Alabama's Chief Justice as administrative head of Alabama judicial system; § 12-5-10(1), (3), and (13) (performance of duties relating to preparation of filing of reports and liaison between courts and other branches of state government).

In *Steigmaier v. Trammell*, 597 F.2d 1027, 1034-1038 (5th Cir. 1979), the court analyzed the role of the Alabama Administrative Director of the Courts. The court concluded that, "...applicable Alabama constitutional and statutory provisions clearly reflect that policymaking decisions with regard to the operation of the Circuit Clerk's office in the Alabama unified judicial system are made by the Administrative Director of the Courts, not the Circuit Clerks." (*id.* at 1034-1035).

On October 9, 1975, the Alabama Legislature adopted a measure designed to implement the new judicial article of the Alabama Constitution. Act No. 1205, 1975 *Ala.Acts* (codified in scattered sections of *Ala.Code* tit. 12 (1975)). Under this act the AOC was created. *Ala.Code* tit. 12, § 12-5-1 (1975).

Under Alabama's unified judicial system, the AOC is the state department charged with the duty of assisting the Chief Justice of the Supreme Court of Alabama in connection with his duties as chief administrative officer of the courts. *Id.* § 12-5-3(a). Among other duties, the AOC is required to work with the clerks of all state courts to "collect, obtain, compile and digest information and statistics concerning the administration of justice in the state." *Id.* §

12-5-3(b)(1). "Unless the chief justice otherwise directs, the department of court management, under the direction of the administrative director of courts, shall have the responsibility for trial court administration." *Id.* § 12-5-6. See also *id.* § 12-5-8 (administrative director of courts ex officio head of department of court management and head of administrative office of courts).

In short, the AOC runs the Alabama courts. That is no doubt the reason that judges asked AOC what to do about obeying the Statutes and did what the AOC directed.

(c) Redressability

The Opinion fails to consider that Plaintiffs' direct injury is that they must as a result of the AOC's preclearance position try their cases before judges who are presumptively biased in favor of their opponents. If the AOC had responded to the judicial inquiries that, based on the Attorney General's opinion or otherwise, the Statutes would be enforced, there can be no plausible doubt that the Statutes would have been obeyed by the judiciary, including Plaintiffs' assigned judges. In fact, the only thing that under the allegations in the complaint is inhibiting enforcement of the Statutes in Alabama is the position of the AOC. Otherwise, Plaintiffs would be able to recuse their present judges and their injuries would be redressed.

It is remarkable that the only Alabama officials mentioned in the Opinion as the ones that have injured Plaintiffs do not believe preclearance is necessary.

But, they defer to the AOC's contrary opinion. Those officials have made no effort to overrule the AOC and to enforce the Statutes. The opinion of the AOC alone is controlling the Alabama judiciary and preventing the enforcement of the Statutes. The AOC obviously has the last word in the matter.

The purpose of § 1973c is to provide a method for making certain that changes in the law comply with the Voting Rights Act. There must be a threshold in deciding whether a statute has the characteristics that Congress intended them to have in order to require submission to the DOJ for determination as to Voting Rights Act compliance. The Panel was asked in the complaint in this case to decide if the Statutes required preclearance or not. It was the stated goal of Plaintiffs to have the Statutes declared outside the requirement of preclearance, not to require preclearance. The AOC is the only state agency claiming the Statutes require preclearance and all others are deferring to the AOC's position. Of course, the AOC can redress Plaintiffs' injury.

IV.

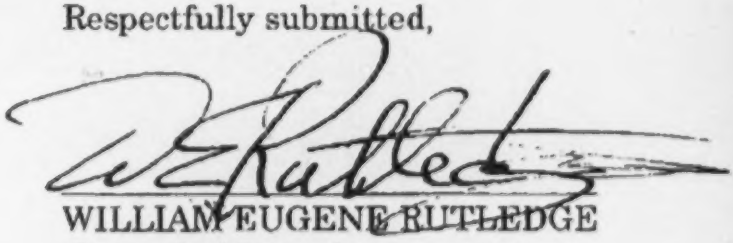
CONCLUSION

The Opinion has *ex mero motu* contrived a "standing" argument to dismiss the complaint to which the parties have not been allowed to respond. That "standing" argument ignores the plausibility of Plaintiffs' claims asserted in the complaint. It has also contrived a "no redressability" argument that makes no sense. The complaint makes it clear that the only

thing standing between Plaintiffs and being able to recuse their present judges, who are presumptively biased against them, is the AOC and its preclearance position. The injunction sought would completely redress the injury.

Plaintiffs pray that this Court will take jurisdiction of this appeal and establish a briefing schedule on the merits. Alternatively, Plaintiffs pray that this Court will summarily reverse the three judge district court and remand this case for further proceedings.

Respectfully submitted,



WILLIAM EUGENE RUTLEDGE
Counsel of Record

Roger C. Appell
3800 Colonnade Parkway
Suite 490
Birmingham, AL 35243
T: (205) 969-2868
F: (205) 969-2862

Counsel for Al Rabiee and William H. Whitehead